Supreme Court, U.S.
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No. 99-7

IN THE

Supreme Court of the United States

RAYMOND A. HAIK; MARK C. HAIK,

Petitioners,

v.

TOWN OF ALTA, a political subdivision of the State of Utah; SALT LAKE CITY CORPORATION, a policital subdivision of the State of Utah,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT SALT LAKE CITY CORPORATION, A POLITICAL SUBDIVISION OF THE STATE OF UTAH

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STATEMENT OF THE CASE AND STATEMENT OF KEY FACTS

Salt Lake City generally accepts Petitioners' Statement of the Case and statement of the key facts, with the following exceptions and additions:

Petitioners' property is located in Little Cottonwood Canyon, which constitutes one of Salt Lake City's most important watersheds. Little Cottonwood Canyon is not situated within the corporate boundaries of Salt Lake City, nor is it within the extraterritorial service area of the City. Salt Lake City provides no municipal services in Little Cottonwood Canyon. Salt Lake City does not treat or distribute any water in the Canyon. Salt Lake City is, however, the owner of significant water rights in Little Cottonwood Canyon, which water is transported by the City for use by its customers within the Cities service area located many miles from the Canyon. Over time, the City has entered into a number of water supply contracts in Little Cottonwood Canyon whereby the City allows raw, untreated water to be diverted within the Canyon and used by the purchasers. Although Salt Lake City is the most convenient source of water for property owners in Little Cottonwood Canyon, it is not the only source. Property owners may seek water through a variety of other sources.

On August 12, 1976, Salt Lake City and the Town of Alta entered into that certain Intergovernmental Agreement Water Supply Agreement Salt Lake City to Alta (the "Water Supply Agreement"), pursuant to which Salt Lake City agreed, subject to specific terms and conditions, to sell water to Alta. Alta is responsible for diverting the water, and constructing the pipelines and facilities necessary to deliver that water to its water customers. The Water Supply

Agreement provides that: "It is expressly understood and agreed that said pipelines shall not be extended to or supply water to any properties or facilities not within the present city limits of Alta without the prior written consent of [Salt Lake] City." Petition App. F at 80a.

Petitioners' attempt to put a positive spin on this language, stating that under the Water Supply Agreement, "water could be extended to [Petitioners'] property with Salt Lake City's consent . . ." Petition at 3. However, the District Court correctly characterized the restriction as follows:

> Paragraph 8 is phrased not in the affirmative language of grant ("Alta may extend its pipelines . . . as approved by Salt Lake City"), but in the negative language of limitation. . . . In essence, Paragraph 8 takes the extension of Alta's water pipelines beyond its 1976 limits out of the subject matter of the Water Supply Agreement and makes such extensions the subject of a future, separate agreement requiring Salt Lake City's prior assent in writing.

Petition App. B at 42a.

In 1983, Alta requested an amendment to the Water Supply Agreement, authorizing an extension of water service into the newly annexed Albion Basin area (where Petitioners' lots are located). Salt Lake City denied the request. In 1988, Salt Lake City reaffirmed to Alta, in writing, its policy of denying the extension of water service into the Albion Basin area, because of the detrimental effect that further development in that area would have on water quality.

Petitioners purchased their four lots in 1994. All four lots are located outside of Alta's 1976 boundaries, and

therefore may not be served by Alta under the terms of the Water Supply Agreement.

At the time of purchase, each of the lots was, and continues to be, entitled to 50 gallons of water per day pursuant to longstanding contracts with the Little Cottonwood Water Company.[1] However, State law adopted after the execution of these contracts, but long before Petitioners' purchase, requires that 400 gallons[2] per day be available to each proposed new residence before a building permit will be issued.

Petitioners' predecessor in interest in the property is Mr. Marvin A. Melville, who had owned all four lots for many years. Mr. Melville had attempted on numerous occasions during the late 1970's to obtain additional water from Salt Lake City in order to qualify for a building permit from Salt Lake County, and was repeatedly turned down. A lawsuit initiated by Mr. Melville against Salt Lake County, seeking the right to develop his property, resulted in a judgment against Mr. Melville because he was not able to demonstrate the right to the minimum water supply required under State law.

At the time Petitioners purchased the lots in 1994, they either knew of Mr. Melville's and Alta's failed attempts to get additional water to the property or, based upon public records and the extremely low price paid for the lots, should have known.

The development of Salt Lake City's water sales policies in its watershed areas has a long history. Salt Lake City has

1. The Little Cottonwood Water Company has been dissolved, and its contracts are administered by Salt Lake City.

2. State law currently requires 800 gallons per day.

collected and compiled data on water quality in the streams located within its watershed for over 40 years. Since 1970, Salt Lake City and other governmental entities with direct interests in protecting the watershed have conducted at least six major studies assessing water quality or watershed management practices. Based upon the findings and recommendations of these studies, and the long experience of Salt Lake City in providing culinary water service, Salt Lake City has concluded that increased residential and commercial development in the watershed has a direct, negative impact on water quality.

In the early 1980's, Salt Lake City adopted a temporary moratorium on new canyon water sales, pending further study of water quality and watershed management practices. In April 1988, in reliance upon such water quality studies, the Salt Lake City Council adopted a Watershed Management Plan, which included numerous recommendations restricting canyon water sales. In April 1991, in reliance upon the studies referenced above, the Salt Lake City Council adopted the 1991 Canyon Water Sales Ordinance, which prohibits the City from entering into any new water sales agreements in the City's watershed, and prohibits the expansion of existing agreements, with three limited exceptions.

Salt Lake City's only major water customer in Little Cottonwood Canyon, other than Alta, is the Salt Lake County Service Area No. 3 — Snowbird (the "Service Area"), which serves Snowbird Ski Resort and the immediately surrounding area. Like the Water Supply Agreement with Alta, Salt Lake City's contract with the Service Area also contains language prohibiting the distribution and use of water outside of the contract boundaries of the Service Area. Consistent with its denial of Alta's requests to expand water service, Salt Lake

City has also denied all Service Area requests to expand water service outside the service boundaries of the Service Area.

Petitioners' have attempted to demonstrate unequal treatment or inconsistency on the part of Salt Lake City by highlighting the City's approval of water use outside of Alta's 1976 boundaries for snowmaking purposes. Snowmaking is an activity which directly benefits the City and has no known harmful effects on the watershed; snowmaking was recommended as an authorized canyon water use in one or more of the above-referenced studies; and snowmaking is one of the three express exceptions set forth in the 1991 Canyon Water Sales Ordinance.

Petitioners have characterized Little Cottonwood Canyon as having "numerous year-round and vacation homes, hotels, shops and other commercial establishments, both within and outside of Alta's town limits." Petition at 5. This is a gross mischaracterization of the Canyon. With the exception of an archive vault at the lower end of the Canyon, all "hotels, shops and other commercial establishments" which are not located within Alta's 1976 boundaries are located within the contract limits of the Service Area. As to "year-round and vacation homes," in the Canyon, these are either (a) located within the 1976 boundaries of Alta or the contract limits of the Service Area; (b) cabins or homes with no water or limited water, built before current State regulations came into effect; or (c) cabins or homes with independent water sources over which Salt Lake City has no control. Little Cottonwood Canyon is much more accurately characterized as wide-open alpine spaces, punctuated by tight pockets of controlled development and ski lift facilities regulated by the Forest Service.

Petitioners repeatedly state and intimate that Alta had more than enough water available under the Water Supply Agreement to service Petitioners' property. Salt Lake City and Alta disputed this assertion as a factual matter before the District Court. The physical availability of the water, however, was held by the District Court to be irrelevant, since "that water is not *legally* 'available' outside Alta's 1976 limits without the consent of the proprietor, Salt Lake City." (Emphasis added.) Petition App. B at 49a.

SUMMARY OF ARGUMENT

Petitioners' Arguments I, II and III relate to a takings claim directed solely toward Alta. Petitioners' sole claim against Salt Lake City is one for injunctive relief, seeking to enjoin the City from withholding its consent to the extension of water lines outside of the Alta's 1976 boundaries to Petitioners' property. Therefore Salt Lake City does not address Petitioners' takings claim.

Petitioners' claim for injunctive relief against Salt Lake City is grounded in the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Petitioners' equal protection arguments were properly briefed and argued before the District Court and the Court of Appeals, and were found to be lacking. Both lower courts correctly articulated the legal standards applicable in an equal protection case. Petitioners have not argued otherwise. Both courts recognized that access to water necessary to develop real property is not a fundamental right, and therefore applied a rational basis standards to their analysis. Both courts correctly applied settled law to the facts, and expressly found that the distinctions drawn by Salt Lake City were rationally related to legitimate governmental objectives. Both lower

courts held that Petitioners failed to sustain their burden of proof that Salt Lake City's action was arbitrary, capricious or irrational. Petitioners have failed to articulate a conflict among the circuit courts of appeals. Petitioners have failed to articulate any compelling reasons this Court should reexamine the rulings below. Finally, equitable considerations argue against granting Petitioners further judicial review of this case.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS' ARGUMENT I DOES NOT APPLY TO SALT LAKE CITY.

Petitioners, in their Argument I, argue that there has been a taking of their property through governmental action. This argument is not directed toward Salt Lake City. The takings claim is directed solely toward Alta; Petitioners' sole claim against Salt Lake City being one for injunctive relief (seeking to require Salt Lake City to consent to the expansion of the Water Supply Agreement against the City's will). Petition App. A at 13a, n.4. Accordingly, Salt Lake City does not address Petitioners' Argument I.

II.

PETITIONERS' ARGUMENT II DOES NOT APPLY TO SALT LAKE CITY.

Petitioners, in their Argument II, further address their takings claim against Alta. For the reasons stated above, Salt Lake City does not address Petitioners' Argument II.

Petitioners' reference to "Respondents" should be disregarded to the extent such term includes Salt Lake City.

III.

PETITIONERS' ARGUMENT III DOES NOT APPLY TO SALT LAKE CITY.

Petitioners, in their Argument III, argue that the District Court and Court of Appeals erred in holding that Alta did not violate Petitioners' rights to equal protection because Alta has no duty under Utah law to provide water to Petitioners. This argument is not directed toward, and will not be addressed by, Salt Lake City.

Salt Lake City wishes to point out, however, that Alta cannot have a "duty" to deliver water to which it has no legal right. Even if Alta did assume some duty vis-à-vis Petitioners, Alta's duty does not translate into Salt Lake City's duty. Alta may not unilaterally amend the Water Supply Agreement and acquire the right to deliver Salt Lake City's water, contrary to the express terms of the Water Supply Agreement and the refusal of Salt Lake City, repeatedly expressed, to extend the water service area.

IV.

EVEN ASSUMING THE EQUAL PROTECTION CLAUSE APPLIES TO SALT LAKE CITY IN THIS CASE, BOTH THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY APPLIED SETTLED LAW TO UNDISPUTED FACTS, AND REACHED THE CORRECT CONCLUSION.

Salt Lake City argued before the District Court and the Court of Appeals that equal protection analysis is not appropriate in a case such as this. The City has entered into an arm's length contract for the sale of raw, untreated water, outside of its municipal boundaries and outside of its limited extraterritorial service area, and solely in its proprietary, and not governmental, capacity. The City's enforcement of the terms of that contract is being challenged by complete strangers to the contract, on equal protection grounds.

The District Court agreed that equal protection analysis is not appropriate, holding that:

> Salt Lake City has no legal duty to furnish water to users outside its own city limits, be they "similarly situated" or not. As an owner of water rights, Salt Lake City's role in this instance is proprietary rather than administrative. The equal protection yardstick is simply not available to measure Salt Lake City's exercise of its contractual power to consent pursuant to Paragraph 8 of the Water Supply Agreement.

Petition App. B at 44a. The District Court went on to hold, arguendo, that even under rational basis analysis, Salt Lake

City's refusal to consent to the expansion of the Water Supply Agreement satisfied the requirements of the Equal Protection Clause. The Court of Appeals did not reach the question of the applicability of the Equal Protection Clause, but assumed such applicability for discussion purposes. Petition App. A at 7a, n.2. The Court of Appeals also held that Salt Lake City's classifications were constitutional. Each of those holdings will be discussed in greater detail below.

A. Both The District Court And The Court Of Appeals Properly Stated The Applicable Law.

Rule 10 of the Rules of the Supreme Court of the United States (the "Rules"), states that "[A] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Both the District Court and the Court of Appeals properly stated the principles of law involved in equal protection analysis. The following principles were articulated by the Court of Appeals:

- "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, Sec. 1. Petition App. A at 8a.

- This Clause "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 793, __, 117 S. Ct. 2293, 2297 (1997), Petition App. A at 8a.

- Unless a legislative classification or distinction burdens a fundamental right or targets a suspect class, courts

will uphold it if it is rationally related to a legitimate end. *Id.* Petition App. A at 8a.

- "The interest in water for real estate development is not a fundamental right." *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990). Similar rulings were cited from the Third, Fifth and Seventh Circuit Courts of Appeals. Petition App. A at 8a and 9a.

- To meet a constitutional challenge the state action in question needs only some rational relation to a legitimate state interest. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Petition App. A at 9a.

- Because state action subject to rational basis review is presumptively constitutional, the burden is on the plaintiffs to establish that the state action is irrational or arbitrary and that it cannot conceivably further a legitimate governmental interest. *Riddle v. Mondragon*, 83 F.3d 1197, 1207 (10th Cir. 1996). Petition App. A at 9a.

- "Under the rational basis test, if there is a 'plausible reason[ ] for [the state] action, our inquiry is at an end.' " *United States v. Castillo*, 140 F.3d 874, 883 (10th Cir. 1998) (quoting *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 116, 179 (1980). Petition App. A at 9a.

- "We need not find that the legislature ever articulated this reason, nor that it actually underlay the legislative decision, nor even that it was wise." *Id.* Petition App. A at 9a.

Likewise, the District Court stated the following equal protection principle:

- Unless a classification trammels fundamental personal rights or implicates a suspect classification, to meet constitutional challenge the law in question needs only some rational relation to a legitimate state interest. *City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976). Petition App. B at 26a.

Unquestionably, the equal protection principles articulated by the District Court and the Court of Appeals represent settled, standard, oft-cited and accepted rules of law governing equal protection analysis. Under Rule 10, the inquiry generally stops there.

B. The District Court And The Court Of Appeals Correctly Applied These Principles To The Facts In This Case.

Not only, however, were the correct principles of law articulated, but they were in fact correctly applied. Even though a governmental entity has no burden of establishing or articulating the governmental objective sought to be accomplished, Salt Lake City nevertheless described its legitimate governmental objective (namely, to preserve the integrity of the watershed and protect water quality), and demonstrated how its water sales policies were rationally related to that objective.

Both lower courts accepted (and Petitioners acknowledge (Petition at 16)) the legitimacy of Salt Lake City's objectives. Petitioners argue, however, that the means used by the governmental entity must be rationally related to that goal, and that "[b]oth courts below totally ignored this second prong of the rational basis test." Petition at 16. Quite to the contrary. Both lower courts expressly found that

the City's means to achieve its objective were rationally related to that objective. The District Court stated:

> . . . Salt Lake City responds that limiting development outside Alta's 1976 limits was accomplished "for the very purpose of preventing development over a dispersed area, since dispersed development has a greater detrimental impact on water quality," thus furnishing a rational basis for the distinction challenged by the [Petitioners]. . . . While the [Petitioners] dispute this rationale, they have not shown it to be arbitrary or capricious, or for that matter, unreasonable.

Petition App. B at 44a, n.15. The Court of Appeals similarly found that:

> . . . Salt Lake City has a legitimate interest in preserving its watershed. The [Petitioners] failed to establish that Salt Lake City's refusal to consent to the extension of Alta's water lines to their property was irrational or arbitrary or that it could not conceivably further a legitimate governmental interest in view of the extensive evidence presented by Salt Lake City regarding preservation of its watershed, Little Cottonwood Canyon.

Petition App. A at 10a. Petitioners have alleged favoritism or unequal treatment on the part of Salt Lake City by citing three examples of City approvals of expanded water use. The Court of Appeals noted that all three approvals were consistent with either the Water Supply Agreement or the 1991 Canyon Water Sales Ordinance, and stated:

> The Salt Lake City Council has made a rational legislative determination that the particular uses above, even if outside existing service areas, will not result in significant harm to the watershed, whereas increased residential and commercial use outside existing service areas (in this case Alta's 1976 town boundaries) will result in such damage. *This classification is rational and is related to the City's stated objective of protecting the watershed.*

(Emphasis added.) Petition App. A at 10a.

Petitioners argue that the City's policies are irrational, or arbitrary, because Alta's 1976 boundaries bear no relationship to geographic or geologic features. Petition at 18. However, it is well established that classifications will not be struck down simply because they are underinclusive. *Railway v. New York*, 336 U.S. 106 (1949). It is rational for the City to conclude that geographic limitations, which prevent sprawling development, will help preserve water quality. In the case of the Water Supply Agreement with Alta, perhaps the circle could have been broader. Perhaps it could have been tighter. That it should be somewhere, however, is not an irrational conclusion, and identifying its precisely optimum location is neither scientifically possible, nor required by law. The Supreme Court has stated: "Perfection in making the necessary classifications is neither possible nor necessary," *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); and "[R]ational distinctions may be made with less than mathematical certitude," *City of New Orleans v. Dukes*, *supra*. In 1976, Alta's boundaries were a legal, political and geographic reality. The town was already in existence at that time. It

was rational for Salt Lake City to determine in 1976 to sell a limited quantity of water within those boundaries, but to foreclose further expansion. That some sensitive watershed territory within those boundaries is subject to harmful development does not mean that all sensitive lands outside those boundaries must share an identical fate. Lines must be drawn somewhere. As the District Court correctly observed: "That the [Petitioners'] preferred outcome may be reasonable or rational does not of necessity render the contrary outcome unreasonable or irrational. Circumstances often admit more than one rational or reasonable result." Petition App. B at 41a and 42a.

Salt Lake City will not repeat here its rationale and justification for its canyon water sales policies. Suffice it to say that those policies are neither arbitrary nor capricious, but are, in fact, the result of a long and deliberate process involving years of study, and culminating in a legislative finding and policy determination by the City Council. One may second guess the decision of the City Council, and argue endlessly over the merits of the end result. But one cannot successfully argue that the City Council was arbitrary, capricious or irrational. Petitioners may not be happy with the City's decision, but such unhappiness does not render the City's decision unreasonable.

There were no genuine issues of material fact before the District Court. Petition App. B at 53a. The holdings of both lower courts regarding Petitioners' equal protection arguments against Salt Lake City are clearly supported by the undisputed facts, and by proper application of correctly stated legal principles to those facts. Both courts expressly held that Petitioners failed to articulate and demonstrate otherwise.

C. There Is No Conflict Between Or Among The Circuit Courts Of Appeals Regarding Any Matter Of Law Applicable To This Case.

Rule 10 of the Rules provides that the Court will consider granting a petition for a writ of certiorari when, among other things, "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter."

Petitioners cite such a conflict as a reason for granting their Petition in this case. The only conflict suggested by Petitioners, however, is that the Court of Appeals' decision in this case is "inconsistent with the implicit basis underlying the holding" in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1997); *Del Monte Dunes of Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1995); *Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990); and *Bowles v. United States*, 31 Fed Cl. 37 (Ct. Fed. 1994), in that it "ignores the need, even under a rational basis test, to find a relationship between the distinction drawn and the ends sought to be advanced." Petition at 18. *Nollan*, *Del Monte Dunes* and *Bowles* are all takings cases. As to *Lockary*, the holding by the Court of Appeals is not inconsistent with *Lockary* since, as we have seen, the Court of Appeals did indeed address the rational relationship issue, expressly found that the Salt Lake City Council had made a rational legislative determination, and further held that Petitioners had failed to establish that the City's actions were arbitrary or irrational.

Ultimately Petitioners' argument is reduced to a disagreement over whether Salt Lake City's policies are rational or irrational. There is no disagreement over legal principles. There is no disagreement over facts. There are

no conflicting precedents to resolve. There is simply a disagreement over the rationality of the City's efforts to protect its watershed. All legal presumptions are in favor of the City. Two federal courts have ruled in favor of the City. There are simply no issues of broad import sufficient to invoke the scrutiny of this Court.

V.

PETITIONERS' PLIGHT IS SELF-INFLICTED, AND DOES NOT PRESENT COMPELLING REASONS FOR GRANTING PETITIONERS' PETITION FOR A WRIT OF CERTIORARI.

Rule 10 of the Rules provides that a petition for a writ of certiorari will be granted only for compelling reasons. Nothing about Petitioners' circumstances would compel review by the United States Supreme Court. Mr. Haik, a city attorney, and his son, should have been aware of the long and unsuccessful battle of their immediate predecessor in interest, Mr. Melville, to obtain additional water for his property; of his repeated requests to Salt Lake City to obtain water; of Salt Lake City's repeated denials; and of Mr. Melville's failure to prevail in the courts. They were aware that the price they paid for the lots was only a fraction of the value of similar lots with water. As recognized by the District Court, Petitioners have now exactly what they purchased from Mr. Melville and paid for in 1994; namely, four lots with insufficient water to obtain a building permit. Petition App. B at 46a. Equity is not on the side of Petitioners. These lots were purchased for purposes of speculation. Petitioners are seeking this Court's assistance in providing them with an economic windfall. This is not a case that deserves or requires the attention of this Court.

CONCLUSION

For the reasons set forth above, and for those set forth in Alta's Brief in Opposition, the Petition should be denied.

Respectfully submitted,

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